IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

W.P. NO. 1346 (MS) OF 2003

Girish Chandra Tripathi .....Petitioner.

Versus

Manager Swami Narayan and others. .....Respondents.

Alok Singh, Sr. Advocate assisted by Sri Lalit Tiwari, counsel for the petitioner.

J.C. Pandey, S. Mishra, S.M. Verma, C.S.C., J.C. Sharma, counsel for the respondents.

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioner has prayed for quashing of the orders passed by the Courts below refusing to grant injunction.

Briefly stated, a suit was filed by the petitioner praying for a permanent injunction restraining the respondents from making the constructions in the second story as mentioned in the plaint map 'अ' 'ब' 'स' 'द'. The plaintiff has alleged that the building is having premises known as Dudhadhari Barfani Ashram. The persons who used to come for Badrinath Ji Dashan are staying in the premises. The Ashram is receiving the air and light up till now but the defendant has started raising the constructions on the second floor as a result of which the complete air and light has stopped and as such the

present suit has been filed. The trial court has granted the injunction in favour of the petitioner. A finding has been recorded to the following effect:-

'' उभय पक्ष को सुने जाने के बाद तथा पत्रावली के अवलोकन से मैं प्रथम दृष्टया मामला वादी के पक्ष में पाता हूं क्योंकि प्रतिवादी का भवन वादी के सम्पत्ति से दक्षिण की ओर ऊंचाई पर स्थित है और जिसका आकार लम्बाई, चौड़ाई एवं ऊंचाई के सन्दर्भ में वादी के भवन से ज्यादा है और जिससे वादी के भवन में हवा एवं सूर्य के प्रकाष के अवरोध होने का अन्देषा है और इसी तरह सुविधा का सन्तुलन भी वादी के पक्ष में पाया जाता है और यदि वादी का प्रार्थना पत्र अस्थायी है निषेधाज्ञा मन्जूर नहीं किया जाता है तो इससे वादी पक्ष को अपूर्णनीय क्षति होगी। उपरोक्तानुसार वादी का प्रार्थना पत्र स्वीकृत होने योग्य है।

<u>आदेश</u>

वादी का प्रार्थना पत्र 5ग2 इस आषय से स्वीकृत किया जाता है कि प्रस्तुत वाद के निर्णय तक प्रतिवादी अपने भवन जिसको कि वाद पत्र के साथ संलग्न नक्षा नजरी अ, ब, स, द भाग से दर्षाया गया है के ऊपर कोई निर्माण कार्य न करे।''

The respondent has preferred an appeal before the District Judge, the learned District Judge has allowed the appeal. The appellate court has recorded a finding that there appears to be no possible reasons which may obstruct the use of the premises by the plaintiff including air and light.

I find that the appellate court has not recorded any definite finding but has only allowed the appeal on the basis of the possibilities alone. The trial court has discussed the prima facie case balance of convenience and irreparable injury and has come to the conclusion that in the event, the injunction is not granted, the plaintiff shall suffer irreparable loss.

The appeal before the District Judge Chamoli was not a regular appeal but it was an appeal against the grant of injunction and as such the appellate court should have looked into the prima facie case and the balance of convenience, since

the prima facie case has been proved before the trial court with regard to the existence of the light and air from the ground floor, the discretion exercised by the trial court was not liable to be interfered in the appeal under Order 43 Rule 1 of the Code of Civil Procedure. While admitting the appeal on 19th December, 2003 following order was passed:-

"Admit. Issue notice to responded no. 1, returnable within three weeks. List thereafter.

Untill further order of this Court, the order dated 19.11.2003 passed by District Judge, Chamoli shall remain stayed."

In view of the above, the trial court is directed to decide the suit by 31st December, 2004 from the date of filing of the certified copy of the order.

Any findings recorded above shall not come in the way of the courts below while deciding the case on merits.

However, till 31st December, 2004, the parties are directed to maintain status quo. The trial court shall also decide the suit itself by that period.

Copy of the order may be given within three days.

02.11.2004 (RAJESH TANDON, J)

P.S.R.